80-5061

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

DENNIS O'CONNOR and MARILYN O'CONNOR, husband and wife,

Petitioners,

v.

THE PALLUDAN CORPORATION, a Nevada corporation.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPRIS

Pursuant to Rule 53(1) of the rules of this Court, motion is hereby made that the petitioners Dennis O'Connor and Marilyn O'Connor, husband and wife, be allowed to proceed in forma paupris for the reasons stated in the attached affidavit. The petitioners have been proceeding in forma paupris in the lower courts. (See pages 3a and 6a of the Appendix in the Jurisdictional Statement filed herewith.)

Dennis O'Connor
DENNIS O'CONNOR

Marilyn O'Connor
MARILYN O'CONNOR

870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121
Petitioners Pro Se

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THE PALLUDAN CORPORATION, a Nevada corporation.

AFFIDAVIT

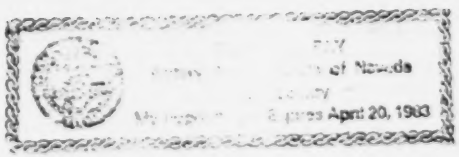
The petitioners, Dennis O'Connor and Marilyn O'Connor, being first duly sworn according to law, deposes and say, in support of their motion for leave to proceed without being required to prepay costs or fees: 1.) We are the petitioners in the above-entitled case. 2.) Because of our poverty we are unable to pay the costs of said cause and still be able to provide ourselves and our children with the necessities of life. 3.) We are unable to give security for the same. 4.) We believe we are entitled to the redress we seek in said cause.

Dennis O'Connor
DENNIS O'CONNOR

Marilyn O'Connor
MARILYN O'CONNOR
Appellant-defendants in forma pauperis and propria persona
870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121

Subscribed and sworn to before me a Notary Public, this 11 day of July, 1980.

NOTARY PUBLIC
(Seal)



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No._____

DENNIS O'CONNOR and MARILYN O'CONNOR, husband and wife,

Appellant,

vs.

THE PALLUDAN CORPORATION, a Nevada corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

JURISDICTIONAL STATEMENT

Dennis and Marilyn O'Connor
870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121

Appellant-defendants in forma paupris, pro se counsel

Dated this 11th day of July, 1980.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

DENNIS O'CONNOR and MARILYN O'CONNOR, husband and wife,

Appellant,

vs.

THE PALLUDAN CORPORATION, a Nevada corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

JURISDICTIONAL STATEMENT

Dennis O'Connor and Marilyn O'Connor, the appellants, appeal from the Order Dismissing Appeal by the Supreme Court of Nevada, dated April 25, 1980, holding that rules 24, 46(b) and 46(c) of the Nevada Rules of Appellate Procedure, Rules 38(b) and 38(d) of the Nevada Rules of Civil Procedure, and Article I, Section 3 of the Nevada state constitution are all violative of the appellants inalienable and I, VII, and XIV amendment United States constitutional rights.

OPINIONS BELOW

The orders and judgments from the Third Judicial District Court of Nevada which appear in the Appendix hereto, pages 1a, 3a, 4a, and 5a, infra, are unreported below.

Copies of the letters from the deputy clerks of the District and Supreme Courts of Nevada to the appellants appear in the Appendix, pages 2a and 6a, infra.

The Orders from the Nevada Supreme Court, which appear in

the Appendix hereto, pages 7a, 8a, 9a, 10a, 11a, infra, are also unreported below.

JURISDICTION

The dismissal of the appeal affirming the summary judgment and dismissing the appellants counter-complaint is a violation of inalienable rights as well as the I, VII, and XIV amendment rights of the federal constitution which include freedom of speech, the right to a common law jury trial in an action at law, and the right to due process and equal protection of the laws.

A supplementary notice of appeal to this Court was duly filed in the Supreme Court of Nevada on May 28, 1980 dated May 27, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) and 28 U.S.C. § 2403(b).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

> Congress shall make no law.... abridging the freedom of speech....

Article I, Section 9, Nevada State Constitution:

> (Freedom of speech and press)
> Every citizen may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

Seventh Amendment, United States Constitution:

> In suits at common law, where the value in controversey shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article I, Section 3, Nevada State Constitution:

> (Trial by jury secured)
> The right of trial by jury shall be secured to

all, and remain inviolative forever; but a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law; and in civil cases, if three-fourhts of the jurors agree upon a verdict, it shall stand and have the same force and effect as a verdict by the whole jury; provided, the legislature, by a law passed by a two-thirds vote of all members elected to each branch therof, may require a unanimous verdict notwithstanding this provision.

Preamble, Nevada State Constitution:

WHEREAS, The act of Congress approved March twenty-first, A.D. eighteen hundred and sixty-four, "To enable the people of the Territory of Nevada to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states", requires that the members of the Convention for framing said constitution shall, after organization, on behalf of the people of said territory, adopt the constitution of the United States; therefore be it Resolved, that the members of this Convention, elected by the authority of the aforesaid enabling act of Congress, assembled in Carson City, the capital of said Territory of Nevada, and immediately subsequent to it's organization, do adopt, on behalf of the people of the said territory, the constitution of the United States.

Fourteenth Amendment, Section 1, United States Constitution:

....No state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

Article I, Section 1, Nevada State Constitution:

(Declaration of rights)
All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Nevada Revised Statutes (1979), Vol. 2, p. 1433; Nevada Rules of Appellate Procedure:

Rule 46, NRAP:

(b.) Appearances in Proper Person; no party except a habeas corpus petitioner may appear in proper person before the Supreme Court.

(c.) Appointment of Counsel; Indigent Criminal, Habeas Corpus Cases.... Only the Supreme Court may appoint counsel to represent indigent criminal

defendants and indigent habeas corpus petitioners in original proceedings before Supreme Court.

Rule 47, NRAP:

(a.) Promulagation of Rules of the Supreme Court; The Supreme Court by action of the majority of the justices may from time to time make and amend these rules governing its practice in any manner consistent with the law and justice.

Nevada Revised Statutes (1979), Vol. 2, p. 1415; Nevada Rules of Appellate Procedure:

Rule 24, NRAP:

(a.) Leave to proceed on Appeal in forma paupris from District Court to Supreme Court. A party to an action in a district court who desires to proceed on appeal in forma paupris shall file in the district court a motion for leave so to proceed, together with an affidavit showing, in the detail prescribed by Form 4 of the Appendix of Forms, his inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal. If the motion is granted, the party may proceed without further application to the Supreme Court and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma paupris, or who has been permitted to proceed there as one who is financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma paupris without further authorization, Etc....

Nevada Revised Statutes (1979), Vol. p. 1427; Nevada Rules of Appellate Procedure:

Rule 38, NRAP:

(b.) Frivolous Appeals, Attorney Fees as Costs. In any civil matter, when an appeal has frivolously been taken or been processed in a frivolous manner; when circumstances indicate that an appeal has been taken or processed soley for purposes of delay, when an

appeal has been occasioned through respondent's imposition on the court below; or whenever the appellate processes of this court have otherwise been misused, this court may, on it's own motion, require the offending party to pay, as costs on appeal, such attorney fees as it deems appropriate to discourage like conduct in the future.

Nevada Revised Statutes (1979), Vol. 2, p. 1232; Nevada Rules of Civil Procedure:

Rule 38, NRCP; Jury Trial of Right.

(a.)Right Preserved. The right of trial by jury as declared by the constitution of the State or as given by a statute of the State shall be preserved to the parties inviolative.

(b.) Demand; (Jury Trial) The 1960 amendment requires demand to be by separate document but does not require demand to be made until the case is set for trial.

(d.) Waiver; Deposit of Jurors' Fees.... The rule was amended in 1960 to provide that the deposit shall be made at the time the demand is made. The words "trial jurors" were used to make clear that payment is to be made only for the trial jurors and not for the panel.

Nevada Revised Statutes (1979), Vol. 2, p. 1232 and 1233, Nevada Rules of Civil Procedure:

Rule 39, NRCP; Trial by Jury or by the Court.

(a.) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attornies of record, by written stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the state.

(b.) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the Court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in it's discretion upon motion may order a trial by a jury of any or all issues.

Nevada Revised Statutes (1979), Vol. 1, p. 178, State

Judical Department:

NRS 6.140(4) Fees and Expenses of Jurors. In civil cases, the per diem of each juror engaged in the trial of the cause must be paid each day in advance to the clerk of the court, or the justice of the peace, by the party who has demanded the jury. If the party paying such fees is the prevailing party, the fees are recoverable as costs from the loosing party. Etc.

Nevada Revised Statutes (1979), Vol. 1, p. 23; Judical Department Generally:

NRS 1.030. The common law of England, so far as it is not repugnant or in conflict with the Constitution of the United States or the constitution and laws of this state, shall be the rule of decision, in all courts of this state.

Nevada Revised Statutes (1979), Vol. 5, p. 4272; Landlord and Tenant: Dwellings, Habitability of dwelling unit:

NRS 118A.290(i) Ventiliating, air-conditioning and other facilities and appliances, including elevators, maintained in good repair if supplied or required to be supplied by the landlord.

QUESTIONS PRESENTED

Whether an appearance on Appeal in the proper person before a state Supreme Court is in fact pro se counsel and a right guaranteed by the Federal and Nevada state constitutions as opposed to state statutory laws.

Whether the state should appoint counsel for appellant-defendants or respondents proceeding in forma paupris in a civil action as well as in criminal actions when the Court refuses to allow appearances in the proper person.

Whether an appellant-defendant which has been hailed into court in a civil action can assert his inalienable rights of acquiring, possessing, and protecting property by exercising the I and XIV Federal constitutional rights of freedom of speech and due process and equal protection of the laws.

Whether Article I, Section 3 of the Nevada state constitution is unconstitutional as the framers deliberately omitted provisions for a common law jury trial in an action at law.

Whether a state can require a pre-deposit as a precondition to filing a demand for a right granted by the federal constitution.

Whether it was an abuse of judical discretion for the lower district and appellate state courts to dismiss an appeal without ruling on the federal questions involved, NRAP 47(a).

Whether rules 24(a), 46(b) and (c) of the Nevada Rules of Appellate Procedure, rules 38(b) and (d) of the Nevada Rules of Civil Procedure, and Nevada Revised Statute 6.140(4) are unconstitutional for the discriminatory vagueness as these rules make no provisions for those proceeding in forma paupris in a civil action.

RAISING THE FEDERAL QUESTION

The appellants first raised the federal question of the right to a common law jury trial in an action at law to one of the deputy clerk's of the Third Judical District Court of Nevada. The appellants were attempting to file a demand for a common law jury trial pursuant to NRCP 38(a) and (b). The clerk dutifully refused to file the jury demand making reference to NRCP 38(d) and NRS 6.140(4) which require a pre-deposit. The appellant advised said clerk of the Seventh Amendment of the Federal constitution. The clerk replied that the court must follow the Nevada Rules of Civil Procedure. The appellants then proceeded to make their demands for a common law jury trial on an Application for Setting which appears in the record below. Subsequently, the district court replied to the jury request in a letter in which was the

following statement: " Please note that this matter was not set for jury trial as the Nevada Rules of Civil Procedure regarding jury demand and costs were not complied with." See p. 2a, infra.

The appellants also made an oral plea for a common law jury trial at the hearing for summary judgment pursuant to NRCP 39(b) on October 4, 1979. The Court seemed miffed and asked, " What's the common law got to do with this...." The Court did not await or request a response from the appellants herein and said the appellants did not understand the nicetities of the law, NRCP 39(a). Needless to say, the summary judgment against the appellants herein was granted.

Subsequently, the appellants filed motions in opposition to the wrongful equity judgment raising the federal question. The said motions were denied by the district court.

The appellants proceeded on appeal in forma paupris before the Nevada Supreme Court raising the federal question in depth in the Opening Brief and a subsequent motion.

The Nevada Supreme Court made no ruling on the federal question raised by the appellants before dismissing the appeal pursuant to NRAP 46(b). The appellants were proceeding in forma paupris pursuant to NRAP 24(a) rather than NRAP 46(b) and had petitioned the Court to appoint counsel or in the alternative allow an appearance before the Court in the proper person (pro se counsel).

STATEMENT OF THE CASE

The appellants had owned and operated a pizza restaurant in Fallon, Nevada for four years before being forced out of business by the appellees through a constructive eviction which subsequently merged into an extrinsic fraud eviction.

From July of 1974 through September of 1976 the appellants conducted their pizza business in a small home-converted-into-a-

restaurant.

The appellants business was successful and the need for expansion was evident.

The appellees agreed to build a commercial building which by the terms of the lease was to be used for a pizza parlor, bar, gambling, and other games of amusement. The lessor in it' design, construction, and specifications was to provide a heating and cooling system.

The air-conditioning units were not big enough for the size of the building. The installer was not licensed for the installation and maintenance of the refrigeration units as required by Nevada state law.

The outdoor temperatures during the summer months are very often in the nineties and sometimes reach 104 degrees, in Fallon.

In addition to the high outdoor temperatures, the indoor temperatures were unbearable due to the inadequate air-conditioning system as well as the two pizza ovens that were operating at 500 degree temperatures.

The appellants made several verbal complaints to the appellee of which at one point the junior member of the family corporation told the appellant, Mr. O'Connor, "if you don't like it, get out."

On April 19, 1978, the appellants herein filed suit in the Third Judical District Court of Nevada for breach of contract.

On August 30, 1978 the lower district court found that the building was uninhabitable and that it was the duty of the lessors to fix it. (NRS 118A.290)

On September 12, 1978, the appellants sent a demand to the appellees to provide an adequate cooling system per the court findings on August 30, 1978.

On September 22, 1978 the appellees answered the demand stating that they would only fix the cooling system if and until the appellants met with some preconditions of removing certain improvements on the building which had been made at the expense of the appellants. This was not a precondition that had been set by the Court.

The appellants had endured two hot summers without adequate air-conditioning with the indoor temperatures in the nineties and reached a point in 1978 where they could no longer pay the rent and also meet their monthly obligations. Therefore, the appellants discontinued to pay rent because of the diffuculties.

On October 27, 1978 the appellees served the appellants with an eviction notice demanding $2,000.00. This sum included back and current due rent which was $500.00 monthly.

The appellants discontinued operating their business approximately fifteen days later and left the heavy restaurant equipment in the disputed premises and in accordance with Polk v. Armstrong, 91 Nev. 558 (1975).

The appellees filed suit against the appellants for non-payment of rent on November 13, 1978.

On December 4, 1978 the appellants answered and filed the counterclaim of constructive eviction.

On December 7, 1978 the appellees replied to the counterclaim denying the allegations set forth in the appellants counterclaim.

On or about December 9, 1978 the appellants received a copy of the appellees Petition For Writ of Restitution and the courts order to Show Cause Why Writ of Restitution Should Not Issue to be heard on January 2, 1979. The appellants received the said Petiton and Order To Show Cause through the mail at their

residence. The attorney for the appellants had not been consulted or notified by the attorney for the appellees or the court regarding the hearing to be had on January 2, 1979.

On January 2, 1979 the appellants filed a Response of Defendants' Attorney To Order To Show Cause Why Temporary Writ of Restitution Should Not Issue stipulating that he had a prior court committment which was to continue for four days and could not make an appearance at the hearing on January 2, 1979. The appellants therefore appeared in the proper person, pro se counsel. The Court issued a Temporary Writ of Restitution on that day ordering the appellees to post a $5,000.00 bond to indemnify the defendants from any loss or damage which might have been sustained by them as a result of the wrongful issuance of the Temporary Writ of Restitution. See p. 1a, infra.

Upon posting bond, the appellees paddlocked and chained the doors of the disputed premises making it impossible for the appellants herein to remove their belongings.

Without notifying the appellants or securing a Writ of Attachment from the Court, the appellees went into possession of approximately $3,000.00 worth of the appellants belongings and contacted the bank which was carrying the loan on the additional equipment and had them remove it.

The appellees secured a $12,000.00 building permit on the disputed premises, completed the building to the specifications that had been promised to the appellant including a complete ovehaul of the cooling system and the installation of an additional unit. The building was remodeled to suit offices and rented to a bookkeeping firm for almost three times the monthly rent that the appellants had been paying. The building permit was issued in March of 1979 and the building was rented in July of

1979 even though the appellees were in possession of a Temporary Writ of Restitution only.

The appellants could no longer afford to pay an attorney and on June 6, 1979 filed a request to represent themselves in the proper person. The request was granted.

On June 25, 1979 the appellants answered the court's setting questionnaire in which they requested a common law jury trial pursuant to the VII amendment of the federal constitution as well as NRS 1.030 and NRCP 38(a). The court replied with a letter denying the request for a common law jury trial on the grounds that the Nevada Rules of Civil Procedure regarding jury demand and costs were not complied with. See p. 2a, infra.

On July 11, 1979 the appellees filed a motion for summary judgment with the district court.

On July 16, 1979 the appellants filed an application to proceed in forma paupris.

On July 20, 1979 the appellants filed a motion in opposition to summary judgment setting forth several genuine disputes including fraud with paticularity.

On July 23, 1979 the appellants again requested a common law jury trial as well as a hearing date on the in forma paupris application.

On July 31, 1979 the presiding judge entered an Order of Disqualification of himself and reassigned the case to another district court judge. Shortly thereafter, a deputy court clerk informed the appellants that all motions filed by the appellants would be considered at the hearing for summary judgment.

On October 4, 1979 the hearing on all motions was held. The appellants made an oral request for a common law jury trial. The Court proceeded to award the unlawful equity judgment as well as

granting the motion to proceed in forma paupris. See p. 3a, infra.

On October 10, 1979 the appellants filed an affidavit in opposition to unlawful equity judgment.

On October 15, 1979 the entry of summary judgment was made. See p. 4a, infra.

On October 25, 1979 the appellants filed a motion to set aside and vacate the summary judgment.

On November 7, 1979 the appellants again attempted to file a demand for a common law jury trial. The deputy court clerk advised the appellants that the in forma paupris rule did not extend to deposits for juries. The appellant informed the deputy clerk of the unconstitutionality of not providing jury trials pursuant to the VII amendment of the federal constitution. The deputy clerk did not officially file the demand at that time but did receive it and agreed to submit the argument to file the demand for jury trial to the Court.

On November 14, 1979 the appellants filed an application to have the judgment stayed pending appeal with the district court. A notice of request to proceed in forma paupris in the proper person or in the alternative have counsel appointed on appeal before the Nevada Supreme Court was also filed by the appellants that day.

On December 13, 1979 the District Court proceeded to deny appellants motions to set aside and vacate summary judgment as well the stay of judgment even though the appellees had entered no objection to the motions. See p. 5 a, infra.

The appellants then proceeded on appeal before the Nevada Supreme Court in forma paupris.

On December 21, 1979 the Nevada Supreme Court received an

indexed copy of the complete record below along with a copy of the certified Court minutes from below.

Shortly thereafter the appellants received a letter from a Nevada Supreme Court deputy clerk dated December 21, 1979 in which was the following statement: " I wish to bring to your attention Rule 46(b) of the Nevada Rules of Civil Procedure, a copy of which I enclose." See p. 6a, infra.

On or about December 28, 1979 the appellants filed a motion to stay judgment pending appeal with the Nevada Supreme Court. The appellants were barely able to provide themselves and their children with the bare neccessities of life and any execution of a wrongful and unlawful equity judgment would have caused irreparable harm.

On January 14, 1980 the Court denied the motion to have judgment stayed pending appeal, without prejudice. See p. 7a, infra.

On January 22, 1980 the appellants filed an Opening Brief raising the federal question of the right to a common law jury trial as well as requesting the appointment of counsel or in the alternative to enter an appearance in the proper person before the Nevada Supreme Court.

Also on or about January 22, 1980 the appellants filed a motion to have judgment stayed pending appeal which again was denied by the Court on February 8, 1980. See p. 8a, infra.

On or about February 15, 1980 the appellants once again filed a motion to have judgment stayed pending appeal.

On February 16, 1980 the appellees filed a motion requesting the Court to impose sanctions pursuant to rule 38(b) of the Nevada Rules of Appellate Procedure.

On February 20, 1980 the appellees filed a motion to dismiss appeal.

On February 27, 1980 the Court threatened the appellants with sanctions pursuant to rule 38(b) NRCP (sic) if another motion to have judgment stayed pending appeal were to be filed. See p. 9a, infra.

On March 20, 1980 the Court ordered the appellants to procure an attorney. See p. 10a, infra.

On April 18, 1980 the appellants filed points and authorities in opposition to the motion to dismiss appeal listing several attornies including the public defender, all of which had refused to proceed on appeal in forma paupris for the appellants before the Nevada Supreme Court.

On April 25, 1980 the Nevada Supreme Court dismissed the appeal pursuant to rule 46(b) of the Nevada Rules of Appellate Procedure without appointing counsel for the appellants. See p. 11a, infra.

On or about May 28, 1980 the appellants filed a notice of appeal to the United States Supreme Court upon all parties required to be served. See p. 12a, infra.

The appellants now appeal the this Court to protect, preserve, and defend their inalienable and constitutional rights.

THE QUESTIONS ARE SUBSTANTIAL

The question as to a defendant's inalienable rights to protect and possess property rights in a civil action through the exercise of the I, VII, and XIV amendments of the Federal Constitution is a novel and substantial one. It has never been presented before this Court and there are very few case precedents regarding a defendant's constitutional rights in a civil action.

The state of Nevada contends that the right to appear pro se before an appellate court is a statutory privelege rather than

an inalienable and constitutional right. To support this proposition, the state of Nevada has relied on Mirin v. The Justices of the Supreme Court of Nevada, 415 F. Supp. 1178 at 1188 (1976):

> "Thus the Supreme Court in Price made it unequivocally clear that the right to argue personally a criminal appeal does not rise to federal constitutional dimensions. It follows that a civil defendant's right to orally argue a civil appeal cannot even aproach federal constitutional parameters."

The appellants maintain that the right to orally argue a civil appeal before a state appellate court, paticularly when the said Court has failed to exercise an option of appointing counsel for the in forma paupris appellant-defendants, is a violation of the defendant's I and XIV amendment rights of freedom of speech and due process and equal protection of the laws. Assuredly, there can be no greater absolute and primary right to freedom of speech than to that of a defendant proceeding in forma paupris.

The appellants have been denied access to the state appellate court soley because they are without the funds with which to pay an attorney.

The Court has recognized that the denial to indigents of access to the state appellate court is discrimination. Griffin v. Illinois, 351 U.S. 12 (1956).

At the same time, the Court has defined the terms of "meaningful access" in Ross v. Moffitt, 417 U.S. 600 (1974):

> "The fact that an appeal has been provided does not automatically mean that the State then acts unfairly by refusing to provide counsel for indigent defendants at every stage of the way, but unfairness results only if the State singles out indigents and denies them meaningful access."

The appellants did not wish to be a burden on the state and were agreeable to pro se counsel in the event the Nevada Supreme Court did not feel that the appointment of counsel was necessary. However, the state high court did not exercise either option and in so doing did abuse the discretion of the Court.

Accordingly, the Court has found that the appellate courts should investigate the record and should appoint counsel if in their opinion it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court. Douglas v. California, 372 U.S. 353 at 355 (1963).

The appellants were entitled to a reversal and remand from the state appellate court by virtue of the VII amendment of the federal constitution and the fact that the counter-claim of constructive eviction and set-off of rent were specified in the answer to the appellees complaint. Pernell v. Southall Realty, 416 U.S. 363 (1974).

The right to trial by jury through Article III, Section 2, Paragraph 3, the Sixth amendment, and the Seventh Amendment is a procedural devise rooted in experience and recorded in the Bill of Rights, not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of "life, liberty, or property." Adams v. U.S. ex rel McCann, 317 U.S. 269 at 276 (1942).

The right to proceed in forma paupris including the benefits of a common law jury trial is not statutory. The power of the English common-law to remit fees on petition in forma paupris did not originate in any statute, but was exercised as

one of the inherent powers of the Courts themselves, independently of statute. Martin v. Superior Court of California, 168 P. 135 (1917).

A state denies due process of law to indigent persons by refusing to permit them to bring civil action except on payment of court fees and costs which they are unable to pay. Boddie v. Connecticut, 401 U.S. 371 (1971).

The right to a common law jury trial in a civil action at law is guaranteed to all citizens by virtue of the VII amendment of the federal constitution. The right to a common law jury trial is guaranteed to Nevada citizens by the Preamble of the Nevada state constitution and NRS 1.030. Yet the framers of the Nevada state constitution deliberately and unconstitutionally excluded the common law jury from Article I, Section 3 of the Nevada state constitution. The statutory requirement of a pre-deposit in a civil action can only extend to equity actions as the federal constitution does not guarantee a jury trial in an equity action. The Court made such a finding in Murdock v. Pennsylvania, 319 U.S. 105 (1943):

> " A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Since the privelege in question is guaranteed by the Federal Constitution and exists independently of state authority, the inquiry as to whether the State has given something for which it can ask a return is irrevelant."

Pro se counsel is an inalienable right and is guaranteed to Nevada citizens by the state constitution, Article I, Section 1 and Article I, Section 9 as well.

Inalienable rights are described in the Political Writings of John Adams, edited by George A. Peek, Jr., New York: Liberal Arts Press, 1954 at p. 96:

> "All men are born free and independent, and have certain natural, essential, and unalienable rights, among which may be reckoned with right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

Since the early Territorial days it has been said that Nevada has the best justice money can buy. This may seem to be a harsh and critical description of the state judical system yet the appellants have experienced it to be literally true. Furthermore, the framers of the constitution of Nevada did indeed intentionally structure the judicary to be of greater benefit to the wealthy who had "millions of dollars at stake."

In discussing the exclusion of the right to a common law jury trial from Article I, Section 3 of the Nevada state constitution on Wednesday, July 6, 1864 recorded in the Nevada Constitutional Debates and Proceedings, Andrew J. Marsh, official reporter, San Francisco: Frank Eastman (1866) at p. 54, one of the delegates issued the following caution and warning:

Mr Fitch: "I will not detain the Convention two minutes, but here is as good a place as any to express my opposition to this whole theory of a three-fourths verdict. I consider it an innovation, and nothing else but experimental legislation, and I think an organic law is the last place in the world in which experimental legislation should be permitted or tolerated. I know that there are arguments against compelling an entire jury to agree before returning a verdict, but I think it is better to hear to those ills we have than to fly to others we know not of. And I think this thing has never been attempted in any other State in the Union. It is an experiment taken from the jury system in Scotland, and I believe it would be about as illy fitted to this State as to any other in the world. I have no doubt that the proposition will pass, but I desire to enter my opposition to it."

Page 56 of Nevada Constitutional Debates and Proceedings, hereinafter to be referred to as the "Debates":

Mr. Chapin: "We have our juries sitting upon cases where millions of dollars are at stake, and we are obliged to take men from such juries who are unknown to us, whose integrity has never had a test, and we know that it has been proved, time and again, that some of those men can be approached, that they can be bribed to stand out, and verdicts have in that manner, been prevented in cases where the greatest injustice has thereby been done."

Debates, supra at page 63:

Mr. Nourse: "It strikes me as being the most absurd thing in the world, that twelve men, drawn from the different walks of life, should be empowered to determine nice questions of law. You might just as well set an attorney to mending a watch. By this absurd proposition, you take away the proper occupation of a Judge, and leave him merely to exercise the functions of a chairman of a town meeting."

In the above quote, Mr. Nourse, an attorney, expressed the same view that the members of the Nevada legal profession also have today. That is to say that the public exists for the convenience of the attornies and the exploitation of the courts rather than the lawyers existing for the convenience of the public and the courts for the common good.

The inalienable right of pro se counsel was discussed on page 782 of the Debates, supra:

Mr. Hawley: It says, in Section 8 "the party accused shall be allowed to appear and defend in person and with counsel. I submit that under that language a person, however competent, might not be permitted to appear for himself without counsel. I move to insert the word OR instead of the word AND so as to read IN PERSON OR WITH COUNSEL."

Mr. McClinton: "I have no objection to the amendment, but I am satisfied that the use of the word AND does not make it obligatory upon a man accused to employ counsel."

Mr. Brosan: "Not at all."

Mr. Banks: "That is clear."

Mr. McClinton: "OR would perhaps read better."

The President: "Will the amendment attain the desired object? Would not the legislature then be authorized

to pass a law providing that, though a man might enter an appearance by counsel, yet, when he so appeared, he could not appear and defend in person?

Mr. Warwick: "I object to that amendment."

The President:"I think it is right as it is. It will not preclude a party from either defending in person, or calling in the assistance of counsel."

Mr. Collins:"Of course it is not obligatory upon a man to employ counsel."

One of the members of the Convention summed it up this way at page 689 of the Debates, supra:

Mr. Frizzel: "I read law once myself, and have been admitted to the bar in two States, but I do not think I would make a good lawyer, because I am too honest." (Laughter)

In short, the framers of the Nevada Constitution did not intend for the legislature to pass statutory laws denying the right to pro se counsel. Therefore NRAP [redacted](b) is unconstitutional.

The rights of due process and equal protection of the laws for the "accused" extend to a defendant in a civil action as well as in a criminal action, there can be no distinction. The appellants have been denied any semblance of the I, VII, and XIV amendment federal constitutional rights and now appeals to this Court to assert those rights.

CONCLUSION

For all of the aforementioned reasons, this Court should note probable jurisdiction on this appeal.

Respectfully submitted,

Dennis O'Connor

Marilyn O'Connor

Dated this 14th day of July, 1980.

Marilyn O'Connor
870 Soda Lake Road
Fallon, Nevada 89406
Appellants in forma pauperis and propria persona

APPENDIX

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APPENDIX 1a

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CHURCHILL

PALLUDAN CORPORATION,
a Nevada corporation,

Plaintiff,

vs.

DENNIS O'CONNOR and MARILYN
O'CONNOR, husband and wife,

Defendants.

NO. 13059

FILED
1979 JAN 2 PM 5:08
MANUEL BARBACHEA
COUNTY CLERK
BY _____ DEPUTY

ORDER THAT TEMPORARY WRIT OF RESTITUTION ISSUE

The above-entitled matter, having come on regularly for hearing on the 2nd day of January, 1979, pursuant to an Order to Show Cause issued by the Court on the 8th day of December, 1978, and it appearing to the court that the Defendants were duly and properly served with said Order to Show Cause within the time limitation set forth therein, and the Plaintiff, having appeared by and through its Vice President, Eric C. Palludan, Jr., and represented by counsel, John W. Diehl, Esq., and the Defendant, Dennis O'Connor, having appeared in Court in opposition to the Petition for a Temprorary Writ of Restitution and not accompanied by counsel, and it further appearing to the Court that James F. Sloan, Esq., attorney for the above-named Defendants, did on the 2nd day of January, 1979, file with the Court his response to the Petition and his consent that the matter be heard in his absence, and the Defendant, Dennis O'Connor, having likewise consented in open court to the hearing of the Petition in the absence of his attorney, and the Court having heard and considered the exhibits, testimony, and argument presented on behalf of Plaintiff and Defendants, and good cause appearing therefor,

IT IS HEREBY ORDERED that a Temporary Writ of Restitution be issued by the Clerk of this Court restoring to the Plaintiff the immediate possession of the real property described in Plaintiff's Complaint on file herein.

IT IS HEREBY FURTHER ORDERED that said Temporary Writ of Restitution will not issue until the Plaintiff has posted with the Clerk of this Court an undertaking in the sum of FIVE THOUSAND ($5,000.00) DOLLARS conditioned to indemnify the Defendants from any loss or damage which may be sustained by them as a result of the wrongful issuance of said Temporary Writ of Restitution.

IT IS HEREBY FURTHER ORDERED that counsel for Defendants may file with the court, at any time prior to the final disposition of the above-entitled case, a motion to increase the amount of said undertaking, which motion, after notice to counsel for the Plaintiff and hearing, will be determined by the Court.

DATED this 2nd day of January, 1979.

DISTRICT JUDGE

MANUEL BARRENCHEA
CLERK AND TREASURER

CLERK OF THE BOARD OF COUNTY COMMISSIONERS

CLERK OF THE DISTRICT COURT

REGISTRAR OF VOTERS

OFFICE OF THE
COURT CLERK
CHURCHILL COUNTY, NEVADA
73 N. MAINE ST., FALLON, NEVADA 89406
CHURCHILL COUNTY LAW ENFORCEMENT FACILITY

TELEPHONE
423 6080

June 25, 1979

APPENDIX 2a

DENNIE O'CONNOR
870 Soda Lake Road
Fallon, Nevada 89406

RE: PALLUDAN vs O'CONNOR
Case #13059

Dear Mr. O'Connor:

Enclosed is a copy of the Setting Memo in the above entitled matter.

Please note that this matter was not set for jury trial as the Nevada Rules of Civil Procedure regarding jury demand and costs were not complied with.

It was noted on your setting questionnaire that you requested a court reporter. One will be provided by the court as per your request, of course, you realize this will be at your expense.

Very truly yours,

MANUEL BARRENCHEA
County Clerk & Treasurer

Anita Hubbard

Anita Hubbard
Deputy Court Clerk

APPENDIX 2a

APPENDIX 3a October 4, 1979

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF CHURCHILL

PRESENT: The Honorable J. Charles Thompson, District Judge

Richard Overley, Bailiff

Anita Hubbard, Deputy Court Clerk

The Honorable Court convened in special session on the above date the hour of 10:02 o'clock A.M.

PALLUDAN CORPORATION,

Plaintiff,

VS NO. 13059

DENNIS O'CONNOR and
MARILYN O'CONNOR,

Defendants.

This was the time previously set by the Court for Plaintiff's Motion for Summary Judgment and defendant's Application to Proceed In Forma Pauperis.

Defendant's application to Proceed In Forma Pauperis was granted.

Opening argument by Mr. Diehl on the Motion for Summary Judgment and answering argument by Mr. O'Connor.

An ORDER was entered granting the Motion for Summary Judgment and allowing the plaintiff $300.00 attorney fees.

There being no further matters to come before the Court at this time, recess was declared at 10:53 o'clock A.M.

APPROVED: J. Charles Thompson
J. Charles Thompson, District Judge

ATTEST: Anita Hubbard
Anita Hubbard, Deputy Court Clerk

APPENDIX 3a Page 4-B

I, Anita Hubbard, Deputy County Clerk of the District Court of the State of Nevada, in and for Churchill County, do hereby certify that the foregoing is a full, true and correct copy of the original on file in my office.

April 28, 1980

Anita Hubbard, Deputy

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CHURCHILL

NO. 13059

PALLUDAN CORPORATION,

Plaintiff,

vs.

DENNIS O'CONNOR and
MARILYN O'CONNOR,

Defendants.

FILED
'79 OCT 15 PM 4:38
MANUEL BARRENCHEA
COUNTY CLERK
BY ANITA DEPUTY
HUBBARD

SUMMARY JUDGMENT

This cause came on to be heard on motion of plaintiff for summary judgment, pursuant to Rule 56 of the Nevada Rules of Civil Procedure, and the Court having considered all the affidavits, papers and pleadings in said cause, and the Court having heard the argument of counsel and the argument of defendants in proper person, and due deliberation having been had thereon,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's motion for summary judgment be, and the same hereby is, granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a writ of restitution issue in favor of the plaintiff and against the defendants for those certain premises located at 365 South Maine Street in the City of Fallon, County of Churchill, State of Nevada, and that the lease entered into between the plaintiff and the defendants on October 1, 1976, be, and it is hereby, declared forfeited by the defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff have judgment against the defendants for the sum of THREE THOUSAND ($3,000.00) DOLLARS for rent due from July 1, 1978, to January 2,

1979.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff have and recover of and from the defendants its costs of suit incurred, together with an attorneys' fee in the sum of FIVE HUNDRED ($500.00) DOLLARS.

DONE IN OPEN COURT the 4th day of October, 1979.

S/ J. CHARLES Thompson
DISTRICT JUDGE

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CHURCHILL

NO. 13059

PALLUDAN CORPORATION,

Plaintiff,

vs.

DENNIS O'CONNOR and
MARILYN O'CONNOR,

Defendants.

FILED
'79 DEC 13 PM 4:43
MANUEL BARRENCHEA
BY _____ COUNTY CLERK
DEPUTY

ORDER

It appearing to the Court that defendants' herein did, on the 25th day of October, 1979, file their Motion to Set Aside and Vacate Summary Judgment and did, on the 14th day of November, 1979, file their Application to have Judgment Stayed Pending Appeal and these matters having been presented to the Court for its consideration; and good cause appearing therefor,

IT IS HEREBY ORDERED that defendants' Motion to Set Aside and Vacate Summary Judgment be, and the same hereby is denied.

IT IS HEREBY FURTHER ORDERED that defendants' Application to have Judgment Stayed Pending Appeal be, and the same hereby is denied.

DATED this 11 day of December, 1979.

J. Charles Thompson
DISTRICT JUDGE

LAW OFFICES
DIEHL, RECANZONE
AND EVANS
A Professional
Corporation
65 S. MAINE
FALLON, NEVADA

OFFICE OF
CLERK OF THE SUPREME COURT
C. R. DAVENPORT, CLERK
CAPITOL COMPLEX
CARSON CITY, NEVADA 89710

APPENDIX 6a

December 21, 1979

Mr. Dennis O'Connor
870 Soda Lake Road
Fallon, Nevada 89406

Dear Mr. O'Connor:

Re: O'Connor v. Palludan Corp., No. 12330 (District Court No. 13059).

A certified copy of court minutes of the district court granting your application to proceed in forma pauperis, and the Record on Appeal, Vol. I, Pleadings, and Vol. II (transcript of trial proceedings), were filed and docketed this day, December 21.

Your time is now running within which to file your opening brief. The original and six copies are required.

I wish to bring to your attention Rule 46(b) of the Nevada Rules of Appellate Procedure, a copy of which I enclose.

Sincerely yours,

Judith McCulloch

Judith McCulloch
Deputy Clerk

CRD:jcr
Enclosures

cc:
Honorable Manuel Barrenchea
Messrs. Diehl, Recanzone & Evans

APPENDIX 6a

APPENDIX 7a

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS O'CONNOR and MARILYN O'CONNOR, husband and wife,

Appellants,

vs.

PALLUDAN CORPORATION, a Nevada Corporation,

Respondent.

No. 12330

FILED

JAN 14 1980

CLERK OF SUPREME COURT

BY DEPUTY CLERK

O R D E R

Appellants have filed a motion to "stay judgment pending appeal." However, they have not complied with all of the requirements of NRAP 8(a). Specifically, although the motion states the reason for the relief requested, it fails to state the facts relied upon. Moreover, the motion should be accompanied with affidavits and parts of the record if appropriate. Accordingly, the motion is denied, without prejudice.

It is so ORDERED.

Mowbray, C. J.

cc: Hon. J. Charles Thompson, District Judge
Messrs. Diehl, Recanzone and Evans
Manuel Barrenchea, Clerk
Dennis O'Connor and Marilyn O'Connor

APPENDIX 8a

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS O'CONNOR and MARILYN O'CONNOR, husband and wife, Appellants, vs. PALLUDAN CORPORATION, a Nevada Corporation, Respondent.	No. 12330

FILED

FEB 8 1980

CLERK OF SUPREME COURT

BY _____ DEPUTY CLERK

O R D E R

Appellants have filed a motion to "stay judgment pending appeal." NRAP 8(a).

However, a party seeking a stay must generally show that irreparable injury would result from a denial of the stay, see Wh. Pine Power v. P.S. Comm., 76 Nev. 263, 352 P.2d 256 (1960); Kress v. Corey, 65 Nev. 1, 189 P.2d 352 (1948), that he will likely prevail on the merits of the appeal, Long v. Robinson, 432 F.2d 977 (4th Cir. 1970), and that the other party will not be substantially harmed by a stay, Long v. Robinson, supra. Appellants have made no such showing. Accordingly, the motion for a stay is denied.

It is so ORDERED.

Thompson, C. J.

_____, J.

_____, J.

cc: Hon. J. Charles Thompson, District Judge
Messrs. Diehl, Recanzone and Evans
Manuel Barrenchea, Clerk
Dennis O'Connor and Marilyn O'Connor

APPENDIX 9a

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS O'CONNOR and MARILYN O'CONNOR, husband and wife

Appellants,

vs.

PALLUDAN CORPORATION, a Nevada Corporation,

Respondents.

No. 12330

FILED

FEB 27 1980

CLERK OF SUPREME COURT

DEPUTY CLERK

ORDER

Appellants' third motion for stay pending appeal is denied. Further applications for the same relief will subject appellants to sanctions under NRCP 38(b).

It is so ORDERED.

_____, C. J.

_____, J.

_____, J.

APPENDIX 9a

cc: Messrs. Diehl, Recanzone & Evans
Dennis O'Connor
Marilyn O'Connor

APPENDIX 10a

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS O'CONNOR and MARILYN O'CONNOR, husband and wife,

Appellants,

vs.

PALLUDAN CORPORATION, a Nevada Corporation,

Respondent.

No. 12330

FILED

MAR 20 1980

CLERK OF SUPREME COURT

BY Judith McCullough

DEPUTY CLERK

ORDER

Good cause appearing, appellants are allowed until and including April 18, 1980, to procure an attorney and to reply, through counsel, to respondent's motion to dismiss this appeal. Failure to do so may result in dismissal of this appeal. NRAP 46(b).

It is so ORDERED.

Mowbray, C. J.

Thompson, J.

Batjer, J.

APPENDIX 10a

cc: Messrs. Diehl, Recanzone & Evans
Dennis O'Connor
Marilyn O'Connor

AFFIDAVIT OF SERVICE

LEWIS O'CONNOR and MARILYN O'CONNOR, husband and wife, Appellant,

v.

PALLUDAN CORPORATION, a Nevada corporation, et al., Appellee.

I hereby verify that on the 27th day of May, 1980 a copy of the Notice of Appeal from the judgment entered by the Nevada Supreme Court on April 25, 1980 was mailed, postage prepaid, to each of the following:

Attorney General Richard Bryan
Capitol Complex
Heroes Memorial Building
Carson City, Nevada 89710

The Nevada Supreme Court
C.R. Davenport, Clerk
Capitol Complex
Carson City, Nevada 89710

Diehl, Recanzone, and Evans
65 South Maine Street
Fallon, Nevada 89406
(Attornies for the Palludan Corporation)

Manuel Barrenchea, Clerk
869 South Maine Street
Fallon, Nevada 89406

I further verify that all parties required to be served have been served.

Sworn to me on this 27th day of May, 1980.

Robbie L. Mayfield
NOTARY

(SEAL)

ROBBIE L. MAYFIELD
Notary Public - State of Nevada
Washoe County
My Commission Expires Nov. 2, 1980

Betty Weiss
BETTY WEISS
133 Mount Rose Street
Reno, Nevada 89509
Making service for the Appellant-defendants

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS O'CONNOR and MARILYN O'CONNOR, husband and wife,

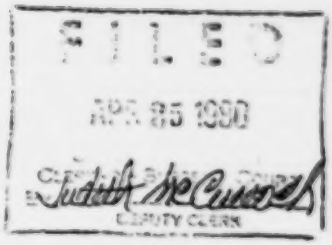
Appellants,

vs.

PALLUDAN CORPORATION, a Nevada Corporation,

Respondent.

No. 12330



ORDER DISMISSING APPEAL

As appellants have failed to secure counsel in accordance with our order of March 20, 1980, this appeal is dismissed. NRAP 46(b).

It is so ORDERED.

Mowbray, C. J.

Thompson, J.

Gunderson, J.

Manoukian, J.

Batjer, J.

APPENDIX 11a

cc: Hon. J. Charles Thompson, District Judge
Messrs. Diehl, Recanzone & Evans
Dennis O'Connor
Marilyn O'Connor
Manuel Barrenchea, Clerk

FILED
MAY 28, 1980

Dennis and Marilyn O'Connor
870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121

Appellant-defendants Informa
Paupris and Propria Persona

In the Supreme Court of the
State of Nevada

DENNIS O'CONNOR and MARILYN O'CONNOR, husband and wife, Appellant,

v.

PALLUDAN CORPORATION, a Nevada Corporation, et al., Appellee.

No._____

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that DENNIS O'CONNOR and MARILYN O'CONNOR, the appellants above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nevada, affirming the dismissal of the complaint, entered in this action on April 25, 1980.

This appeal is taken pursuant to 28 U.S.C. §§ 1257 (2) and 28 U.S.C. § 2403 (b).

Dated this 27th day of May, 1980.

Dennis O'Connor
DENNIS O'CONNOR
Marilyn O'Connor
MARILYN O'CONNOR
870 Soda Lake Road
Fallon, Nevada 89406
Appellants In Forma Paupris
and Propria Persona